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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ROBERT RELFORD

Petitioner,

v.

LEXINGTON FAYETTE URBAN COUNTY GOVERNMENT

Respondent.

On Petition For Writ Of Certiorari
To The Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner respectfully requests that this Court accept certiorari on the following questions:

1. Can a governmental agency ignore the specific mandates of its Reasonable Cause Testing drug and alcohol policy and force an employee to submit to a drug test outside of the parameters of that drug-testing policy without committing a Fourth Amendment Constitutional violation?
2. Must a governmental employee physically urinate in order to suffer a violation of his Fourth Amendment Constitutional rights?
3. Does a governmental agency violate an employee's Constitutional rights when it disciplines that employee based upon drug test results authorized by an order that is subsequently determined to be invalid?
4. Can a federal court ignore factual findings contained in a final state court administrative agency action?

PARTIES TO THE PROCEEDINGS

The parties below were petitioner Robert Relford (appellant), and respondent Lexington-Fayette Urban County Government (appellee below).

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ROBERT RELFORD

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LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

Respondent.

* * * * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT RELFORD, Petitioner, by the undersigned counsel, under appropriate rules of this Court, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This matter arose as a result of a suspension and attempted termination of Petitioner, a government employee, following the Respondent's failure to comply with its own drug-testing procedures adopted to conform to the protections mandated under the Fourth Amendment. When the Petitioner refused to submit to the illegal test, the Respondent suspended him and ordered him to undergo random drug-testing. The Kentucky state court, reviewing the Respondent's actions as part of an administrative appeal, held that the Respondent's actions were arbitrary and capricious, and that the Respondent had failed to

adhere to its own drug testing standards and procedures that were established to protect the employee's rights under the Fourth Amendment to the United States Constitution.

Petitioner filed an action in the United States District Court for the Eastern District of Kentucky claiming violations of his Constitutional rights under the Fourth, Fifth, and Fourteenth Amendments resulting from the drug-testing actions taken by the LFUCG with regard to both the initial attempt to drug test Petitioner as well as the LFUCG's subsequent mandatory drug-testing of the Petitioner. The District Court ultimately concluded that the Respondent's actions were reasonably justified, stating that "the Court finds that an arrest for possession of drug paraphernalia is also a suitable factor that may be taken into account" [Appx. 22a]. In addition, the court also held that, even though Petitioner was suspended from his employment as a result of his refusal to subject to the illegal drug test, "he was never searched in violation of the Fourth Amendment ... [and thus] was never subjected to a 'search' or 'seizure,' [and] no possible Fourth Amendment violation could have occurred." [Appx. 30a.] Judgment was entered in favor of the LFUCG. [Appx. 26a.]

An appeal was subsequently taken to the United States Court of Appeals for the Sixth Circuit, and the Sixth Circuit affirmed the decision of the District Court [Appx.1a], 2004 U.S.App. LEXIS 24464 ((6th Cir. 2004), ___ F.3d ____ (6th Cir. 2004). That decision of the Sixth Circuit is now in direct conflict with this Honorable Court's decisions mandating minimum safeguards in the drug-testing of public employees, and, if allowed to stand, will allow governmental entities to ignore their published drug-testing policies and procedures and to demand drug-testing of their employees as long as the governmental entity can provide some justification, after the fact, for suspecting the employee of substance-related activity. This will give rise to a nebulous "reasonable suspicion"

standard not found in the entity's published drug-testing policy and procedures.

STATEMENT OF JURISDICTION

Subject matter jurisdiction for the United States District Court for the Eastern District of Kentucky is found in 28 U.S.C. § 1331. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. Amend. IV, V, and XIV; 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Robert Relford worked for Lexington-Fayette Urban County Government ["LFUCG"] as an electrician. He was arrested on May 29, 1997 for criminal trespass and possession of copper tubing used in his job but which was characterized as drug paraphernalia. A month later, when Relford's supervisor discovered that Relford had been arrested, the supervisor served him with a notification of reasonable cause testing ["RCT"] and a instructed Relford to immediately undergo a drug test. The LFUCG's "Alcohol and Drug Free Workplace Guidelines and Procedure Handbook ["Handbook"] specifically provides that notice of an RCT can issue only when the LFUCG has a "reasonable suspicion" that the employee is under the influence of drugs or alcohol ***at work***, or that his behavior or performance ***at work*** is affected by drugs or alcohol. [Appx. 3a.] The LFUCG admitted that Relford exhibited no such signs.

The Handbook requires that the LFUCG's decision to issue an RCT must be based upon actual observation and documentation of drugs or alcohol, including smelling alcohol

on the employee's breath, hearing slurred speech, observing impaired actions or conduct, and appearance. [Appx. 3a.] In addition, the Handbook required that such a determination had to be in writing, signed by two trained supervisors or professional law enforcement or medical personnel. Only after that RCT determination has been made can the Director of the employee's Division issue the RCT Notice and require the employee to submit to a drug test involving urine, blood, or breath. [Appx. 3-4a.]

Even though no one at the LFUCG had made any such observations nor had any documentation of drug or alcohol abuse by Relford, and even though there was no determination made in writing by two trained supervisors or professionals, all as required under the LFUCG Handbook, the LFUCG issued an RCT notice requiring Relford to undergo a drug test, claiming that the RCT was reasonable because of his "recent police arrest for possession of a controlled substance and drug paraphernalia." Relford, however, had never been arrested for possession of a controlled substance, only for possession of drug paraphernalia. Based on the faulty RCT notice, Relford requested that the notification be corrected to state a proper basis, and when the LFUCG refused to do so, Relford refused to take the drug test. [Appx. 4a.]

The LFUCG then filed a charge with the Civil Service Commission ["CSC"] requesting that Relford be terminated because of his refusal to take the drug test. [Appx. 4a.] On October 15, 1997, the CSC concluded that the LFUCG had reasonable grounds to subject Relford to a drug test, even though the CSC acknowledged that "the Government failed to adequately advise Mr. Relford of the grounds for which he was requested to take the drug test ... by and through the obviously inaccurate or defective 'Notification of Reasonable Cause Testing'; [and,] [t]hat the Government's guidelines in regard to 'reasonable cause testing' are confusing." [Appx. 4a.] Although

the CSC refused to approve Relford's dismissal, it authorized a 30 day suspension and required him to participate in an employee drug-treatment program that included random drug-testing. [Appx. 4a.] Relford appealed this suspension and mandatory drug-testing. However, on December 1, 1997, while his appeal was still pending, he was ordered to undergo a random test and tested positive. [Appx. 5a.]

Faced with termination and prolonged suspension, Relford was forced to resign. [Appx. 5a.] Six months later, the Kentucky circuit court struck down the CSC's order that had suspended Relford and had subjected him to the random drug-testing. That decision was affirmed by the Kentucky Court of Appeals. The state courts specifically concluded that the LFUCG had acted arbitrarily and had failed to comply with its own drug-testing policies and procedures. [Appx. 5a.]

Relford then brought suit against the LFUCG in Federal Court, claiming that his Constitutional rights had been violated twice: first, when the LFUCG demanded that he submit to an RCT pursuant to a notice that was defective on its face and which did not comply with the RCT requirements contained in the Handbook; and second, when the LFUCG used the results of a subsequent random test that had been permissible only under an order that had been nullified by the state court.

Notwithstanding the state courts' decisions, the District Court ruled in favor of the LFUCG [Appx. 15a; Appx. 27a], finding that the Relford's arrest for "possession of drug paraphernalia" provided the LFUCG with sufficient "reasonable suspicion" to justify the RCT test [Appx. 24a], notwithstanding the lack of any such provisions in the LFUCG's policy. Relford appealed that decision to the Sixth U.S. Circuit Court of Appeals, claiming that the LFUCG violated his constitutional right not to be searched and his right to due process.

The Sixth Circuit concluded that the LFUCG's failure to follow its own Handbook's policies for conducting an RCT did not result in a violation of Relford's Constitutional rights; [Appx. 1a.] that Relford's refusal to take the faulty drug test precluded him from recovery [Appx. 10a]; and finally, that Relford suffered no loss attributable to the second test because the LFUCG had provided Relford with sufficient notice to satisfy his due process rights. [Appx. 11a-12a.] The within Writ follows.

REASONS FOR GRANTING THE WRIT

I. CAN A GOVERNMENTAL AGENCY IGNORE THE SPECIFIC MANDATES OF ITS REASONABLE CAUSE TESTING DRUG AND ALCOHOL POLICY (AS SET FORTH IN ITS EMPLOYEE HANDBOOK)AND LEGALLY FORCE AN EMPLOYEE TO SUBMIT TO A DRUG TEST NOT IN CONFORMITY WITH THE AGENCY'S POLICY?

Searches and seizures are typically required to be conducted pursuant to a valid warrant, designed in part to provide a detailed scope of the search. With respect to workplace drug policies that provide for individualized employee testing, constitutionally-based rules requiring documentation of reasonable cause "assure that judicially-mandated and agency-directed constitutional rights are respected." Garrison v. Dept. of Justice, 72 F.3d 1556, 1573 (Fed. Cir. 1995). Further, "[w]here the rights of individuals are affected, ***it is incumbent upon [employers] to follow their own procedures***." Morton v. Ruiz, 415 U.S. 199, 235 (1974). [Emphasis added.]

In Skinner v. Railway Labor Executives' Assoc., 589 U.S. 602, 617 (1989), citing with authority, Nat'l Treasury Employees Union v. Von Raab, 816 F.2d 170 (1987), this Court specifically held that requiring public employees to submit to a urine test clearly falls under the guise of a Fourth Amendment

search "[because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable...." [Citations omitted.] 617.[1]

In the case at bar, Relford, unlike the employees in Skinner, *supra,* and Von Raab, *supra*, was ***not*** directly engaged in employment which rises to such a level as constitutes "special needs." Moreover, the LFUCG has never articulated any basis short of the individualized reasonable suspicion required by Vernonia School Dist. 47 v. Acton, 515 U.S. 646 (1995) and its progeny, with respect to Relford. The LFUCG's failure to provide the specificity required by the Fourth Amendment resulted in an unconstitutional testing of Relford.

In its Opinion and Order, the CSC concluded that "the Government failed to adequately advise Mr. Relford of the grounds for which he was requested to take the drug test; [t]hat the Government may have ... ***misled*** Mr. Relford as to those grounds and the consequences of his failure to take the test, by and through the ***obviously inaccurate or defective*** "Notification of Reasonable Cause Testing"; [and,] [t]hat the Government's guidelines in regard to 'reasonable cause testing' are ***confusing***." [Emphasis added.] Each of these conclusions leads to an unconstitutional drug-testing of Relford.

A. The lower courts' conclusion that Relford's Fourth Amendment rights were not violated because he did not actually urinate in a cup is in direct conflict with See v. City of Seattle and Camara v. Municipal Court and their progeny.

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[1] The Skinner Court ultimately allowed testing due to the "surpassing safety interests" inherent in the underlying train accident drug testing policy, emphasizing the importance of testing immediately following train accidents -- an issue not present in the underlying case.

In rejecting Relford's position, the lower courts improperly concluded that the LFUCG's suspension and threatened termination of Relford, as well as the faulty drug-testing Notification, did not result in a Fourth Amendment violation because Relford did not actually urinate in a cup. This ruling is in direct conflict with See v. City of Seattle, 387 U.S. 54, 87 S.Ct. 1737 (1967) and Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967). In each of these cases, this Court addressed the validity of an administrative search despite the fact that the claimant had been punished for refusing to submit to a search. Importantly, ***neither*** individual in Camara or See actually subjected himself to a search. Instead, just as Relford, each of the claimants sought protection from the Courts and/or administrative bodies, and refused to submit to an illegal search. In each case, despite the fact that the individuals had not "actually subjected [themselves] to a [search]," as mistakenly required hereinbelow, this Court clearly established that a Fourth Amendment violation occurs when an individual has ***refused*** to allow an illegal search and/or seizure, and does not require that the individual first subject him or herself to an unconstitutional violation before having standing to sue.

Numerous courts, in addition to Camara and See, *supra*, have held that even when there has been a refusal to submit to a search on the basis of an alleged Fourth Amendment violation, it is appropriate to conduct a Fourth Amendment analysis into the reasonableness of the demand. *See e.g.*, Carrelli v. Ginsburg, 956 F.2d 598 (6th Cir. 1992)(a jockey's refusal to submit to drug test); Ensor v. Rust Engineering Co., 935 F.2d 269 (6th Cir. 1991)(nuclear weapons plant worker's refusal to submit to a drug test); Willis v. Anderson Community School Corp., 158 F.3d 415 (7th Cir. 1998)(student's refusal to provide urine sample); Roberts v. City of Newport News, 36 F.3d 1093 (4th Cir. 1994)(employer's "demand that Roberts submit to urinalysis ***was not made***

pursuant to a systemized program of any sort and [the employer] did not have 'reasonable suspicion' that Roberts was using drugs ***while on the job***")(emphasis added); Hearn v. Board of Public Education, 191 F.3d 1329 (11th Cir. 1999)(teacher terminated from position for refusing to take drug test); Hatley v. Department of Navy, 164 F.3d 602 (Fed. Cir. 1998)(firefighter's refusal to submit to random drug test); King v. McMickens, 501 N.Y.S.2d 679 (1986) (when the refusal to take a drug test results in disciplinary action, the issue is whether the requirement to submit is justified under the Fourth Amendment).

It has been well established that a ***threatened*** violation of one's constitutional rights is sufficient to establish a cognizable right. Elrod v. Burns, 427 U.S. 347, 373-74 (1976); United States v. Allen, 644 F.2d 749 (9th Cir. 1980); United States v. Place, 462 U.S. 696, 707 (1982); Chicago Acorn, et al. v. Metropolitan Pier and Exposition Authority, 941 F.Supp. 692 (N.D.Ill. 1996); Stott v. Revere Transducers, Inc., 993 F.Supp. 118, 125 (D.Conn. 1998). The lower courts' conclusion that no violation of the Fourth Amendment could have occurred because Relford did not "actually subject[] himself to a drug test" is contrary to existing law. Camara, *supra*; See, *supra*.

In O'Connor v. Ortega, 480 U.S. 709, 107 S.Ct. 1492 (1987), this Court established that public employees who have a legitimate expectation of privacy are protected by the Fourth Amendment to the United States Constitution against unreasonable workplace searches and invasions of their privacy and that the analysis to be utilized is one of the balancing of "the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." Ortega, *supra* at 719-20. As articulated in National Treasury Employees Union v. U.S. Department of Treasury, *et al*, 838 F.Supp. 631 (D.C. D.C. 1993)(emphasis added):

> ***[T]he injury is the threatened loss of constitutional rights. That injury occurs when plaintiffs are forced to choose between revealing constitutionally protected information ... and preserving their rights at the cost of possible further discipline or discharge***." ... The Supreme Court has determined that a ***threat*** of discharge for exercising First Amendment rights is sufficient to establish irreparable harm. Elrod v. Burns, 427 U.S. 347, 373-74 (1976).

As this Court has repeatedly held, the government cannot punish constitutionally protected conduct by denying government employment. Rankin v. McPherson, 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)). By punishing an employee for exercising his Fourth Amendment rights in refusing to submit to a search, the employer has violated the employee's Fourth Amendment rights to be free from unreasonable searches and seizures. Id. Any other conclusion denies governmental employees the very protections that all citizens enjoy, and is directly contrary to the Fourth Amendment.

In the case here under review, Relford was actually placed under the control of his immediate superior, driven to the testing facility, and threatened that any failure to abide by his superior's instructions would result in termination. The lower court's ruling that an employee must submit to an unconstitutional search before a claim could be brought under the Fourth Amendment, precludes the claimant's right to challenge the demand, as recognized, *en banc*, in Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987)("[b]ecause Everett's continued employment was contingent upon his subjection to a search, ***we must determine whether the search offended the Fourth Amendment***. *See, e.g.,* Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967)." [Emphasis added.]

The lower courts' refusal to adhere to the precedent

established by Elrod, *supra*, and its progeny, sets the Sixth Circuit apart from the other Circuit Courts to have addressed this issue, and results in unequal enforcement of the United States Constitution among the various Circuits, thereby necessitating the issuance of a Writ of Certiorari to the Sixth Circuit.

B. Demanding that an employee submit to drug testing in violation of the governmental entity's own drug-testing policies and procedures is an unconstitutional seizure.

As set forth by the Fourth Circuit Court of Appeals, a seizure is unconstitutional if the "demand that [the employee] submit to urinalysis ***was not made pursuant to a systemized program of any sort*** and [the governmental employer] did not have 'reasonable suspicion' that [the employee] was using drugs ***while on the job***." Roberts v. City of Newport News, 36 F.3d 1093 (4th Cir. 1994)(emphasis added).

The LFUCG policy provides that reasonable cause testing can only occur when the supervisor has documentation of contemporaneous observation of the employee's use or abuse of drugs and/or alcohol, ***on the job***, in a manner that conspicuously impacts the employee's ability to perform his job. Reasonable suspicion alone is not enough. Here, there was no evidence of any such contemporaneous observation or information that would support a suspicion that Relford was "under the influence of drugs or alcohol" or that someone had seen or heard that drugs and/or alcohol were "being used or stored on LFUCG property." Neither was there any documented evidence that would justify the criteria of the LFUCG's Reasonable Cause Testing. The only basis documented at the time of the demand that Relford undergo mandatory drug testing, and the only basis **ever** communicated to Relford at the time of the RCT Notice, was his falsely

purported "recent police arrest for '***possession of a controlled substance*** and drug paraphernalia.'" [Emphasis added].

As reflected *infra*, the state courts definitively established that "the reason given for the testing was an arrest ... [which] is not one of the criteria for ordering a drug test ...; the basis for the decision to test was not properly documented...; [and] reasonable suspicion, as defined in the Handbook, was not satisfied.... For these reasons, requiring [Relford] to submit to the Reasonable Cause Testing did not satisfy reasonable suspicion under the urban county government's own drug policy; therefore, the decision of the [Commission] was arbitrary." Given a total lack of evidence to support the CSC's conclusion that a proper basis for RCT existed at the time the RCT Notice was issued, the state agency action correctly determined that the LFUCG's actions were arbitrary and that Relford's refusal to submit to such a test was entirely proper. The lower courts, however, concluded that it was of no consequence that the LFUCG ignored its own policies and procedures. Such a holding is in direct conflict with Roberts, *supra*, and a Writ of Certiorari should be issued to the Sixth Circuit Court of Appeals to ensure uniformity among the Circuits.

C. Does a governmental agency violate an employee's Constitutional rights when it disciplines that employee based upon drug test results authorized by an order that is subsequently determined to be invalid?

Before the state court could vacate the CSC Order, the LFUCG forced Relford to comply with the terms of the subsequently-vacated order that required Relford to undergo mandatory drug-testing. Under the express drug-testing procedures set forth in the Handbook, the CSC lacked authority to compel Relford to participate in the second drug-testing

procedure without first converting Relford's proper refusal to submit to the first drug test into a ***positive*** drug test in order to "justify" the second drug-testing. This effort served as nothing more than an end-run around the Constitutional protections afforded to Relford in order to obtain the very drug-testing that is prohibited by the Constitution by use of a demand that was declared invalid by the state court.

Under Fourth Amendment Constitutional law, ***any*** invasion of privacy by the government is, as a matter of law, a violation of an individual's right to privacy ***unless*** it can demonstrate that it has a legitimate basis for engaging in the invasion. Ortega, *supra*. Skinner, *supra*, also provides guidance, stating that "[w]hat is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' ... Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of ***legitimate*** governmental interests.'" Id. at 619. [Citations omitted; emphasis added.] Once the government has taken an employee into custody to be tested, it is unquestionable that the seizure itself results in a constitutional violation -- ***unless the government is able to demonstrate a reasonable basis for its actions.*** Id. *See also* Arizona v. Evans, 514 U.S. 1 (1995).

Since Relford's initial drug test, based solely upon a faulty RCT notice cannot pass the necessary test for reasonableness as set forth in the LFUCG's own policy (and thus the Fourth Amendment), the LFUCG's actions constituted an improper invasion of Relford's right to privacy and a failure to accord to Relford his Fifth Amendment rights to a fair and proper notification, a proper post-deprivation hearing, and an ability to adequately defend. Accordingly, the lower courts' conclusion that Relford was not able to prove an invasion of his privacy as to the initial drug testing efforts because he was not actually subjected to the drug test, or as to the second drug test because

it was "reasonable," fail to properly apply federal Constitutional law.

The lower courts, after mistakenly concluding that Relford did not undergo a search or seizure, negated Relford's Constitutional challenge by concluding that, despite the state agency's previous rulings, and despite the fact that the LFUCG failed to adhere to its own drug-testing procedures, the LFUCG still had "reasonable cause" to drug test Relford because "an arrest for possession of drug paraphernalia is ... a suitable factor" upon which to find reasonableness. The lower courts further attempted to justify the drug testing by erroneously concluding that Relford had "conceal[ed] the arrest in violation of LFUCG policy." However, the LFUCG Handbook contains no such reporting requirement, and the lower courts' conclusion that such a failure to report "demonstrate[d] an even more critical connection to unlawful activity involving controlled substances" is contrary to the Handbook's express provisions.

Significantly, the lower courts' conclusions totally ignore the determination by the Kentucky Court of Appeals that reasonable suspicion was not satisfied, and that the LFUCG did not have reasonable cause to force Relford to undergo a drug testing procedure. As this Court has repeatedly instructed, all governmental employee drug-testing must be conducted pursuant to a ***well-defined plan*** or ***systemized program***. *See e.g.*, Skinner, *supra;* Von Raab, *supra.* In the case here under review, there is no dispute that the LFUCG failed to follow the mandates of its own policy.[2]

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[2] The lower court attempted to justify the LFUCG's actions by opining that Relford "occupies a position that might otherwise be subject to true suspicionless testing by LFUCG" because he "worked as an electrician operating a city owned vehicle on public roadways." [Appx. 20a.] Importantly, the

(continued...)

Based upon Skinner, *supra*, and Von Raab, *supra*, and their progeny, the decision reached by the Sixth Circuit in the matter here under review establishes a dangerous precedent whereby a governmental entity can easily side-step the careful network or legal precedent that has been established to protect the rights of public employees from intrusive governmental actions by simply establishing a *post hac* excuse for its "reasonable suspicions." This cannot be allowed to occur. Public employees must have the right to refuse to submit to unconstitutional and improper drug testing based upon "suspicions" that do not arise from the activities delineated in the employer's well-defined plan or systemized program.

Accordingly, a Writ of Certiorari must be issued to the Sixth Circuit in order to assure that drug-testing is done in conformity with well-defined plans and systematic programs and to maintain a consistent procedure to be followed in the drug-testing of public employees.

II. UNDER THE DOCTRINE OF ISSUE PRECLUSION, THE LOWER COURTS ERRED IN FAILING TO ADHERE TO THE FINDINGS OF THE STATE COURT.

In University of Tennessee v. Elliott, 478 U.S. 788, 106 S.Ct. 3220 (1986), this Honorable Court held, "when a state agency 'acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an

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(...continued)
"safety-sensitive" rationale was never set forth as a basis for the drug testing of Relford. In fact, had Relford's position as a lowly electrician truly been "safety-sensitive," the LFUCG could have easily relied upon the drug testing criteria that exists in its policy for individuals in positions that the LFUCG has deemed are safety sensitive in nature.

adequate opportunity to litigate,' federal courts ***must*** give the agency's factfinding the same preclusive effect to which it would be entitled in the State's court." [Emphasis added]. In addition, 28 U.S.C. §1738 requires that federal courts afford state court judgments both the issue and claim preclusive effects in subsequent actions under 42 U.S.C. § 1983 that the state courts would afford them. *See* Elliott, 106 S.Ct. at 3225 (*citing* Allen v. McCurry, 449 U.S. 90 (1980)(issue preclusion) and Migra v. Warren City School District Bd. of Educ., 465 U.S. 75 (1981)(claim preclusion). *See also* Barnes v. McDowell, 848 F.2d 725, *rehearing den., cert. den.* 109 S.Ct. 789 (6th Cir. 1988)("[t]he factual determination of the state administrative proceedings, as sustained by the state courts ... may not be relitigated in federal court").

Based upon these holdings, the factual determinations made by the Kentucky state courts should not have been subject to relitigation in federal court. Elliott, *supra*; Barnes, *supra*. Instead, the conclusions of the Kentucky state courts should have been given preclusive effect in the underlying action. Unfortunately, however, the lower courts chose to completely ignore the factual determinations that had been definitively established by the previous state agency proceedings, including:

1. "[T]he Government failed to adequately advise Mr. Relford of the grounds for which he was requested to take the drug test";

2. The ***sole*** basis for the initial reasonable cause drug testing was based upon Relford's "recent arrest for 'possession of a controlled substance and drug paraphernalia'";

3, "[T]he Government may have ... misled Mr. Relford as to those grounds [for requiring mandatory drug-testing] and the consequences of his failure to take the test, by and through the obviously inaccurate or defective

'Notification of Reasonable Cause Testing'";

4. "[T]he Government's guidelines in regard to 'reasonable cause testing' are confusing;"

5. The type of drug testing procedure utilized to attempt to force Relford to submit to a search was "reasonable cause testing";

6. "Before undergoing the test ... Relford requested that the reasonable cause notice be reissued to reflect the correct charges";

7. "The Civil Service Commission then issued an order suspending Relford without pay ... ***because he refused to take the drug test***";

8. "[Relford] was selected for testing based on information that he had been arrested for possession of a controlled substance and drug paraphernalia while off duty";

9. "[Relford] was not arrested for possession of a controlled substance";

10. "[T]he [LFUCG] has failed to follow its own drug testing policies";

11. "[Relford] was specifically given notice that he was to be tested under "Reasonable Cause Testing";

12. "[A]n arrest of [Relford] for possession of a controlled substance and paraphernalia ... is not one of the criteria for ordering a drug test under Reasonable Cause Testing... regardless of the fact that [Relford] was not arrested for possession of a controlled substance";

13. "[T]he basis for the decision to test was not properly documented";

14. "There is also no indication of any actual observances of the [Relford] (under the influence) other than his arrest, which has already been disgarded [sic] as a valid basis for the testing";

15. "[R]easonable suspicion ... was not satisfied";

16. "There is no indication in the record that [Relford] was observed under the influence of drugs or alcohol";

17. "There is also no indication that [Relford] was using, had used, or was storing drugs or alcohol 'on LFUCG property'";

18. "[R]equiring [Relford] to submit to Reasonable Cause Testing did not satisfy reasonable suspicion under the urban county government's own drug policy";

19. "Reasonable suspicion" is defined as "whether a reasonable, prudent individual, trained in the symptoms of drug or alcohol abuse would believe, based on observation, that someone was under the influence of drugs or alcohol; or that based on observation that drugs and/or alcohol is being used or stored on LFUCG property";

20. "[T]he 'Notification of Reasonable Cause Testing' was not issued in compliance with the Handbook's procedures";

21. "Failure of the Civil Service Commission to follow its own drug testing procedures rendered the notification and subsequent suspension of Relford arbitrary";

22. The LFUCG's attempted drug-testing of Relford and the its order for mandatory drug-testing were "arbitrary and capricious" and "clearly unreasonable";

23. The CSC's conclusion that the second drug testing of Relford was "reasonable" was categorically rejected.

As reflected hereinabove, the state agency determined that the actions taken by the LFUCG were "arbitrary and capricious," "clearly unreasonable," and that the LFUCG "may have misled Relford." Moreover, the state agency definitively concluded that the LFUCG's drug-testing policy and procedure is "confusing," and that the "failure of the Civil Service Commission to follow its own drug testing procedures rendered the notification and subsequent suspension of Relford arbitrary."

Under the clear and concise holding of Elliott, *supra*, once these factual issues were established by the state agency, the federal courts are precluded from relitigating these same issues. Unfortunately, however, both lower courts completely ignored the holding in Elliott, and, despite the state agency's conclusions that the drug-testing of Relford was "clearly unreasonable" and "arbitrary and capricious," concluded that the first and second drug tests were still "reasonable" because Relford was an electrician operating a governmental vehicle who had been arrested for possession of drug paraphernalia, which "suggests use of those materials for consuming illegal drugs." Such a conclusion directly contradicts this Court's holding in Elliott, *supra*, and Certiorari should be issued so as to assure that conclusions reached by state agencies are provided with proper deference in federal court proceedings.

CONCLUSION

WHEREFORE, Petitioner ROBERT RELFORD respectfully requests that this Court GRANT his Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in order to ensure consistency in the implementation of drug-testing procedures for public employees across the Circuits an to eliminate the implementation of a new "reasonable suspicion" standard.

Respectfully submitted,

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